

Editor's note: Reconsideration denied by Order dated Oct. 11, 1990.

SUNSHINE MINING CO.

v.

STATE OF IDAHO

IBLA 90-13

Decided May 14, 1990

Appeal from a decision by Chief Administrative Law Judge Parlen L. McKenna dismissing protest against patent applications I-16043 and I-16044 with prejudice.

Reversed; protest dismissed without prejudice.

1. Contests and Protests: Generally--Hearings--Rules of Practice: Protests

Withdrawal of patent applications prior to adjudication of a protest against issuance of patent requires dismissal without prejudice of the protest proceedings.

2. Administrative Authority: Generally--Administrative Procedure: Generally--Administrative Procedure: Adjudication

Withdrawal of patent applications following hearing but before a decision on the merits concerning the validity of the claims which were the subject of the hearing eliminated the subject matter on which the Administrative Law Judge's jurisdiction to render a decision was founded. Dismissal of a protest for lack of subject matter jurisdiction is not a decision on the merits and is therefore made without prejudice.

APPEARANCES: Michael K. Branstetter, Esq., Wallace, Idaho, and Fred M. Gibler, Esq., Kellogg, Idaho, for appellant, Sunshine Mining Company; Steven J. Schuster, Esq., Boise, Idaho, for the State of Idaho.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

This case previously came before this Board when the State of Idaho originally appealed a December 19, 1984, decision of the Idaho State Office, Bureau of Land Management (BLM), dismissing a protest by the State against patent applications I-16043 and I-16044 for the Snow Storm and Snow Slide mining claims. The patent applications were filed by Sunshine Mining Company (Sunshine), successor to prior claimants of the Snow Storm and Snow Slide claims. The protest by the State of Idaho was dismissed by BLM because the State had failed to show that title to the land comprising the

two claims vested in the State in 1912 or 1927. Finding there was a presumption that there had been such a vesting, we held it was error to dismiss the State's protest without allowing a hearing and ordered a hearing on the questions raised by the State's protest, directing that:

At hearing the mining claimant shall have the ultimate burden of proof. The burden of going forward at hearing shall, however, be upon the State. The principal issue to be decided at the hearing is whether, on January 25, 1927, there was a valid discovery on each claim contested by the State. See Mangan & Simpson v. Arizona, [52 L.D. 266 (1928)]. A subsidiary issue is whether the land in sec. 16 was mineral in character on the date of survey in 1912.

State of Idaho, 101 IBLA 340, 360, 95 I.D. 49, 60 (1988).

On July 11, 1989, an evidentiary hearing was held in Hailey, Idaho. A transcript of those proceedings shows that the parties stipulated that the claims were mineral in character in 1912, and that the testimony at hearing concerned only whether there had been a valid discovery on the claims in 1927. Following submission of evidence on that issue, posthearing briefing was scheduled by the Judge. Before briefing could occur, however, a "Notice of Withdrawal of Applications for Patent" was filed by Sunshine stating that the company had "withdrawn applications for patent I-16043 and I-16044 for the mining claims." On August 30, 1989, Judge McKenna entered an order dismissing the proceedings then pending before him, stating:

On August 21, 1989, Sunshine notified this office that it had withdrawn its patent applications I-16043 and I-16044 for the "Snowstorm" and "Snowslide" claims. Accordingly, since the disputed applications for patent have been withdrawn, this proceeding, known as State of Idaho v. Sunshine Mining Company and docketed as IBLA 85-355, is hereby dismissed with prejudice to Sunshine's reapplying for a mineral patent on the lands contained within the "Snowstorm" and "Snowslide" claims.

The single issue before us on appeal is whether the Judge properly dismissed the patent applications "'with prejudice' to Sunshine's reapplying for a mineral patent on the lands contained within the 'Snowstorm' and 'Snowslide' claims."

Sunshine argues that the Judge had no jurisdiction under provisions of the Mining Law of 1872, 30 U.S.C. § 21 (1982), or the Code of Federal Regulations (CFR), applicable to Departmental hearings and appeals procedures, to dismiss the protest proceedings with prejudice. Sunshine denies that the Judge had authority to limit its right to file successive applications for patent. Sunshine contends that, without either express or implied authority in the statute or regulations to order dismissal with prejudice, the order is invalid (Sunshine's Brief on Appeal (Statement of

Reasons (SOR) at 4-5)). Among other arguments raised, Sunshine asserts that provisions of Rule 41, Federal Rules of Civil Procedure (Fed.R.Civ.P.), providing for dismissal of actions, may not be applied by the Department unless there is prior comment and notice given pursuant to the provision of the Administrative Procedure Act, 5 U.S.C. § 553 (1982) (SOR at 11).

The State answers that dismissal with prejudice was properly entered by the Judge "to prevent parties from 'judge testing,' conserve administrative resources, and spare the [S]tate from the unreasonable burden of protesting successive patent applications" (Memorandum in Opposition to Brief on Appeal (Answer) at 2). The State urges that the Judge had authority to dismiss the proceedings with prejudice, and contends, relying on United States v. Pittsburgh Pacific Co., 68 IBLA 342, 89 I.D. 586 (1982) (permitting use of interrogatories in administrative proceedings), that while Rule 41, Fed.R.Civ.P. is not expressly applicable to administrative proceedings, the rule provides helpful guidance persuasive in analyzing this appeal.

We reverse Judge McKenna's order dismissing the proceedings pending before him with prejudice to Sunshine and enter an order dismissing the State's protest without prejudice, for reasons set out in detail below.

"[A]ny objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." 43 CFR 4.450-2. Any person is free to protest the issuance of a patent on grounds that the patent application fails to comply with the mining law. 30 U.S.C. § 29 (1982); Scott Burnham, 100 IBLA 94, 118, 94 I.D. 429, 442 (1987), aff'd, American Colloid Co. v. Hodel and Burnham, No. C88-224K, (D. Wyo. Dec. 22, 1988). See also Scott Burnham (On Reconsideration), 102 IBLA 363 (1988). A patent application may be protested any time prior to issuance of patent. Id.

[1] The Department has recognized that patent proceedings may be dismissed, and that dismissal may be either with prejudice or without prejudice to the right to refile patent applications. Union Oil Company of California, 98 IBLA 37 (1987); Donald L. Clark, 64 IBLA 132 (1982); Wilbur G. Hallauer, 52 IBLA 202 (1981); Walter Bartol, 19 IBLA 82 (1975); United States v. Carlile, 67 I.D. 417 (1960). In determining whether it is proper to dismiss an application with prejudice, the Department has considered whether a matter was actually considered on the merits or whether other considerations not affecting the essential validity of the claim were involved. This distinction is a question of substance. "If the issue is one that does not necessarily go to the validity of the claim, rejection of the patent application would not invalidate the claim" and dismissal without prejudice would be appropriate. United States v. Carlile, supra at 427.

We recognize that when the Judge issued his order of dismissal with prejudice the only matter pending before him was the State's protest to Sunshine's patent applications. This was the subject of our remand to the Hearings Division for fact-finding in State of Idaho, supra. The patent

applications were not before him when he issued the order on appeal, having by then been withdrawn by Sunshine. Nor was the question whether there had been a valid discovery of valuable mineral on the claims in 1927 then ripe for decision. Although he had received evidence concerning the discovery issue, the Judge had not adjudicated the question whether there was a valid discovery on the claims in 1927, which was still awaiting scheduled briefing by the parties. Because the patent applications were withdrawn from BLM before that point in the protest proceeding was reached, and the scheduled briefing was consequently never completed, the question of claim validity was never decided on its merits, nor does the order of August 30, 1989, purport to do so.

The effect of a decision dismissing a protest to patent applications is that the protest is no longer a barrier to issuance of patent. Because the State's protest is directed against an action proposed to be taken, in this case issuance of the patents, withdrawal of the patent applications prior to adjudication of the protest necessarily requires dismissal of the protest, there no longer being any action proposed to be taken. Withdrawal

of the proposed action achieves the object of the protest. Of necessity, proceedings instituted to adjudicate the protest then became subject to dismissal without prejudice to the State's right to file another protest should patent applications later be filed. It was error, therefore, to order that dismissal of the protest proceedings would support a finding that Sunshine could not file future applications for the Snow Slide and Snow Storm claims, for there had not been an adjudication of the validity of those claims on their merits. United States v. Carlile, *supra*.

[2] The State cannot be heard to complain that it is inconvenienced by this holding. It has now obtained the result it sought when it pro-tested the applications: the patent applications have been withdrawn and there is no longer any proposal pending that BLM approve them. The protest has served the purpose for which it was designed. If the State had wished to insure that there would be an adjudication of the merits of the Sunshine claims, it should have, and could have brought a private contest pursuant to 43 CFR 4.450-1, which provides pertinently:

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land * * * may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by [43 CFR 4.450-1 through 4.450-8].

Unlike a protest, a contest can be filed at any time against unpatented claims and does not depend on the existence of a pending patent application or any proposed action to be taken by BLM. Unlike the protest filed by the State herein, a withdrawal of pending patent applications would have no effect on the jurisdiction of the Department to adjudicate the merits of a disputed issue. The State, when it chose to use the protest remedy, accepted the limitations inherent in the selected procedure.

This result is consistent with Fed.R.Civ.P. 41, which the State concedes has general applicability to the issue raised by this appeal. Rule 41(b) states, pertinently:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. [Emphasis added.]

Relying on the above-emphasized language of the rule, courts have consistently held that a dismissal for lack of subject matter jurisdiction is not on the merits and is therefore made without prejudice. Verret v. Elliot Equipment Corp., 734 F.2d 235, 238 (5th Cir. 1984); Int'l Hospital Foundation v. United States, 621 F.2d 402, 405 (Ct. Cl. 1980); see generally 5 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 41.14 n.6 (2d ed. 1987 and Supp. 1986). By analogy, the action taken here, where the fact-finder was deprived of the subject under review when Sunshine's applications were withdrawn, is similar in effect to what the courts describe as "subject matter jurisdiction." Confronted with a situation where there was no longer any action proposed to be done by BLM against which there was an objection, there was nothing left for the fact-finder to decide. Under the circumstances, the Judge could not decide whether there had been a valid discovery in 1927, because no one was contending there had been such a discovery.

The fact-finder had authority pursuant to 43 CFR 4.433 to implement Board precedent, be it through a dismissal with prejudice (e.g., Union Oil Company of California, supra, and United States v. Carlile, supra) or a dismissal without prejudice, (e.g., Donald L. Clark, supra), whichever was appropriate. In this case, dismissal without prejudice was required because the subject matter under review was lost when the patent applications which had been protested by the State were withdrawn. No prior determination having been made on the merits, dismissal without prejudice was the inevitable result of the action taken, which was entirely proce-dural in nature. 1/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Chief Administrative

1/ An adjudication is a prerequisite to the application of the doctrines of res judicata and collateral estoppel as well. See generally United States v. International Building Co., 345 U.S. 502 (1953); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Application of res judicata in this case would have required a final judgment on the merits addressing the discovery issue. None existed here. Application of collateral estoppel requires that an issue be litigated and necessarily determined. Balbirer v. Austin, 790 F.2d 1524 (11th Cir. 1986); Anderson Clayton & Co. v. United States, 562 F.2d 972 (5th Cir. 1977). The discovery issue was not so determined in this case.

Law Judge McKenna's decision is reversed and the State of Idaho's protest is dismissed without prejudice.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge